

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) Criminal Action No.:
) 2:17cr120
SHIVRAM PATEL,)
)
Defendant.)

TRANSCRIPT OF PROCEEDINGS

(Sentencing)

Norfolk, Virginia
June 4, 2018

BEFORE: THE HONORABLE MARK S. DAVIS
United States District Judge

Appearances:

OFFICE OF THE UNITED STATES ATTORNEY
By: ANDREW BOSSE, ESQUIRE
Counsel for the United States

CLANCY & WALTER, PLLC
By: TIMOTHY GERARD CLANCY, ESQUIRE
Counsel for Defendant

The Defendant appearing in person.

P R O C E E D I N G S

(Proceedings commenced at 10:06 a.m. as follows:)

COURTROOM DEPUTY CLERK: In Case No. 2:17cr120, the
United States of America v. Shivram Patel.

Mr. Bosse, is, the government ready?

MR. BOSSE: The government's ready. Good morning,
Your Honor.

THE COURT: Good morning, Mr. Bosse.

COURTROOM DEPUTY CLERK: Mr. Clancy, is the defendant
ready to proceed?

MR. CLANCY: He is. Good morning, Judge.

THE COURT: Good morning, Mr. Clancy.

Mr. Clancy, would you and Mr. Patel step to the podium
so that the clerk can administer the oath to Mr. Patel?

(Defendant placed under oath.)

THE COURT: All right. Let's review some of the
history that brings us to this point.

On January 25, 2018, this court entered an order
authorizing a U.S. magistrate judge to conduct guilty plea
proceedings in the case. On February 8, Mr. Patel requested and
consented to the magistrate judge conducting the guilty plea
proceedings, and on that same date, in accordance with the terms
of a written plea agreement, Mr. Patel appeared before

1 Magistrate Judge Lawrence Leonard and pled guilty to two counts
2 of the indictment, Count 1, making false statements and a false
3 writing in a matter within the jurisdiction of the Executive
4 Branch of the United States, in violation of Title 18 of the
5 U.S. Code, Section 1001(a) and Count 3, making a false statement
6 in an application for a passport in violation of Title 18 of the
7 U.S. Code, Section 1542.

8 Judge Leonard accepted the guilty plea, and the matter
9 was then continued for sentencing.

10 The Court has now received and reviewed the
11 presentence report that was prepared in this case by the
12 probation officer, and I have that and have carefully reviewed
13 it.

14 In addition to the presentence report and the -- which
15 was prepared on April 25, 2018, and the addendum prepared on
16 May 17, 2018, the Court has been provided with many letters.
17 First I have an unsigned allocution letter from Mr. Patel.

18 MR. CLANCY: Judge, I do have a signed letter at this
19 point.

20 THE COURT: All right. You can hand that up to the
21 court security officer.

22 MR. CLANCY: It was signed this morning, Your Honor.

23 THE COURT: Thank you.

24 MR. CLANCY: Thank you.

25 THE COURT: And there's no other changes to it other

1 than the signature?

2 MR. CLANCY: There were not, Judge. I think we just
3 explained why we couldn't get him to sign it ahead of time.

4 THE COURT: Okay. Then I have letters from the
5 following individuals: Rashmikanth Patel, the defendant's
6 father. Jayshree Patel, his mother. Shantilal Patel, his
7 grandfather. Runjal Patel, his brother. Harikrishna Patel,
8 uncle. Pranav Parikh, his doctor. Hetal Peters, his cousin.
9 Vinay Ronvelia, a family friend, Rotnam Patel and Sangita Patel,
10 family friends. George Mathew, a family friend. Gunatit Patel,
11 a friend and religious coordinator. Manu Bhagat, defendant's
12 grandmother's brother. Chirag Dalia, defendant's cousin. Gira
13 Ptel, his cousin. Simpson Zhang, his close friend. Patricia
14 MacKenzie, a work associate and friend. Elizabeth Pan,
15 spiritual leader. Shilpa Akhani, defendant's cousin. Albert
16 Randall, a neighbor. And Tushar and Piyusha Gajjar, family
17 friend.

18 Mr. Clancy, did I get them all?

19 MR. CLANCY: You did, sir.

20 THE COURT: Okay. These letters, other than the
21 letter from his physician, don't really contain the kind of
22 medical information that I would typically attach to the
23 presentence report. Do you want any of these attached to the
24 presentence report?

25 MR. CLANCY: That's not necessary, Judge. I just

1 needed them to be considered at sentencing.

2 THE COURT: Okay. How about the letter from his
3 physician?

4 MR. CLANCY: The same. I think it's general enough,
5 the same consideration.

6 THE COURT: All right. So they'll be maintained,
7 they're on the docket already because they were filed as part of
8 your position statement.

9 MR. CLANCY: Yes, sir.

10 THE COURT: Okay. So when Mr. Patel appeared before
11 Judge Leonard he was asked many questions to determine whether
12 he was pleading freely, knowingly and voluntarily and
13 intelligently, and the Court at that time determined that he was
14 so pleading and recommended that this Court accept the plea
15 agreement and make the finding of guilt. I'm prepared to do
16 that. Is there any reason that I should not accept the plea
17 agreement and make the finding of guilt, Mr. Clancy?

18 MR. CLANCY: No, sir.

19 THE COURT: Mr. Patel?

20 THE DEFENDANT: No, Your Honor.

21 THE COURT: All right. Then I do accept the plea
22 agreement and I do make the finding of guilt in this case as to
23 both counts.

24 Now, Mr. Clancy, have you reviewed the presentence
25 report and the addendum and had enough time to review it with

1 Mr. Patel?

2 MR. CLANCY: I have, sir.

3 THE COURT: Did you see any errors you need to bring
4 to my attention?

5 MR. CLANCY: No, sir.

6 THE COURT: And Mr. Patel, have you reviewed the
7 presentence report with the addendum?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Did you have enough time to review that
10 report with your attorney?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Are there any errors contained in the
13 report?

14 THE DEFENDANT: No, Your Honor.

15 THE COURT: And do you believe that this report fully
16 covers your background?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: All right. Since there are no disputed
19 issues, the Court will adopt the factual statements that are
20 contained in the presentence report as its findings of fact in
21 this case.

22 We move on to discuss the statutory punishments
23 established by Congress and the President and then the
24 sentencing guideline range established by the United States
25 Sentencing Commission.

1 First, the statutory punishment for the counts for
2 which the defendant has been found guilty is as follows: For
3 Count 1 a maximum term of five years imprisonment, and for
4 Count 3, a maximum of 10 years imprisonment. As for supervised
5 release, each count authorizes a term of supervision not to
6 exceed three years.

7 Mr. Bosse, do you agree that I've accurately stated
8 those?

9 MR. BOSSE: Yes, sir, Your Honor.

10 THE COURT: And do you, Mr. Clancy?

11 MR. CLANCY: I do, sir.

12 THE COURT: Moving on to the Sentencing Guidelines.
13 It appears that application of the advisory sentencing
14 guidelines results in an offense level of 11 and a criminal
15 history category of I, and the resulting advisory sentencing
16 guideline range is eight to 14 months of imprisonment.

17 Mr. Bosse, of course I'm aware that you have requested
18 a significant upward variance which the defense opposes.
19 However, with respect to the guideline range that I've already
20 stated, do you agree that I've accurately stated the range?

21 MR. BOSSE: I do, Your Honor.

22 THE COURT: Do you, Mr. Clancy?

23 MR. CLANCY: I do, Judge.

24 THE COURT: Mr. Bosse, will the government have any
25 additional evidence or materials to present today or just

1 argument?

2 MR. BOSSE: Just argument, sir.

3 THE COURT: Mr. Clancy, do you have any additional
4 materials or evidence to present?

5 MR. CLANCY: I do, Judge, and I don't believe Mr.
6 Bosse has any objection. I have -- it's a heavily redacted
7 document, Intelligence Note from the FBI. The first is multiple
8 pages dated March 31, 2017 and then a followup dated April 7,
9 2017 consisting of one, total of two pages.

10 THE COURT: Can you pull that microphone up to you and
11 make sure the green light is on?

12 MR. CLANCY: It is. Should I repeat what I just said?

13 THE COURT: No, that's fine.

14 MR. CLANCY: Judge, I believe in discussing this with
15 Mr. Bosse I believe it's incumbent these two documents be filed
16 under seal. They're heavily redacted, there's not much to read,
17 but what is in these two documents is certainly going to be
18 relied on by counsel. So I'd ask, formally ask these be
19 introduced as Defendant's Exhibit 1, albeit under seal.

20 THE COURT: Were these documents produced pursuant to
21 the Classified Information Procedures Act?

22 MR. CLANCY: Yes, sir. And there is a protective
23 order attached to them.

24 MR. BOSSE: They're produced pursuant to the
25 protective order that was entered pursuant to CIPA, yes, sir,

1 Your Honor.

2 THE COURT: But they're still redacted?

3 MR. BOSSE: They are. They are so redacted, Your
4 Honor. Portions of the document are redacted.

5 THE COURT: Because of a higher classification than
6 the material therein?

7 MR. BOSSE: I could address briefly, I could do it
8 here standing?

9 THE COURT: Okay. That's fine.

10 MR. BOSSE: Your Honor, the procedure we used under
11 CIPA to try to get the defense as much information as we could
12 as soon as we could, portions of this document were
13 declassified, and those portions were turned over to the defense
14 under the protective order. We never got through the entire
15 CIPA briefing process through Section III and Section IV, in
16 which case the portions that are currently under seal would have
17 gone to the Court for the Court's review, and if they were
18 material and helpful to the defense, could have been turned
19 over. I know what's in them and the defense has what's material
20 here from this intelligence report. I can say that to the
21 Court.

22 THE COURT: I just have to make sure that if you're
23 asking me to seal something that there's an appropriate basis on
24 which to do it. That's why I'm asking you to provide me with
25 that basis.

1 MR. BOSSE: Yes, sir, Your Honor. For that, for the
2 basis for sealing, I would reference the protective order that's
3 currently in place. I wasn't -- I didn't know this was coming
4 in today, I haven't prepared an argument on sealing. We could
5 do that after the fact if necessary. But standing here today, I
6 can only rely on the protective order for the request to seal.

7 THE COURT: So the protective order was entered for
8 the material in its currently redacted form?

9 MR. BOSSE: That's correct, Your Honor.

10 MR. CLANCY: Yes, sir. And the reason I would like to
11 use it, Judge, I think -- and I'm relying on Mr. Bosse's
12 integrity, which I have no question about, but the conclusions
13 that are drawn, there's very little specifics, but the
14 conclusions drawn from the FBI investigation are particularly
15 significant in my discussions with you in terms of sentencing.
16 And that's why I wanted the Court to consider that.

17 THE COURT: And the government has no objection to the
18 conclusions being referenced?

19 MR. BOSSE: None at all, Your Honor.

20 THE COURT: However, you're saying that the protective
21 order, when it was entered, was based upon a finding of risk
22 that was outlined in the motion for entry of the protective
23 order?

24 MR. BOSSE: That's right, Your Honor. And there may
25 be a scenario where -- I mean, the portions here have been

1 declassified, but standing here today, I don't want to say let's
2 file it on the record without having recourse to review the
3 protective order, speaking with people in D.C. There's a whole
4 host of issues as far as what we're going to do right at this
5 moment. But certainly I've discussed this with Mr. Clancy, no
6 problems with the conclusions being referenced. The last
7 paragraph of the statement of facts is partially drawn from
8 this, and I myself will be referencing it in my argument.

9 THE COURT: Okay. So you can provide that to me.
10 It's already been sealed pursuant to the protective order?

11 MR. CLANCY: Yes, sir.

12 THE COURT: So I don't need to do anything else.

13 MR. CLANCY: I don't believe so. Other than --

14 THE COURT: But the order of the court stands.

15 MR. CLANCY: Yes, sir.

16 THE COURT: Okay.

17 MR. CLANCY: I would ask the Court to review it. It's
18 not that lengthy. It's heavily redacted. That's all the
19 evidence I have, Judge. I just have comments then as well.

20 THE COURT: Do you want me to review it right now?

21 MR. CLANCY: I'm going to be referencing it, I'll be
22 directing the Court's attention to the portions I would like the
23 Court to pay attention to.

24 THE COURT: Okay. So I'll just do it as you are
25 talking.

1 MR. CLANCY: Sure.

2 THE COURT: All right. So then why don't we go
3 ahead -- and it's going to be part of your argument though, it's
4 not part of a proffer? In other words, are you going to
5 incorporate this into your argument or are you going to make a
6 proffer right now and then make argument after Mr. Bosse?

7 MR. CLANCY: No. Now it's in evidence I'm going to
8 reference it as part of my argument probably in rebuttal to some
9 or much of what Mr. Bosse is about to say.

10 THE COURT: All right. So I'll be happy to hear from
11 Mr. Bosse.

12 MR. CLANCY: Thank you, Your Honor.

13 THE COURT: You all can have a seat.

14 MR. BOSSE: Thank you, Your Honor.

15 As Your Honor knows, we are asking for a significant
16 upward variance in this case. And our position is that this is
17 far from a run of the mill false statements or passport fraud
18 case. False statement cases happen most often in the context of
19 an interview with law enforcement where someone lies or attempts
20 to otherwise mislead or obstruct justice. Passport fraud
21 charges happen most often in the immigration context, where
22 people are running passport mills or otherwise fraudulently
23 altering documents to try to get into the United States.

24 Here, the two charges of conviction have to be looked
25 at in context taking into account all of the relevant conduct in

1 the case because it's the recent conduct that bears on
2 materiality of the false statements and shows why they were made
3 and then why the passport fraud was then made to cover up the
4 false statements.

5 I'll talk briefly -- or maybe not briefly, about the
6 nature and circumstances of the offense. In July 2016, Mr.
7 Patel travels to China to teach English, but before he did that,
8 he's researching ISIS, including things like how to join ISIS,
9 he's viewing ISIS propaganda. He even showed it, I believe, to
10 a family member. He's running searches for how to evade
11 polygraph tests. And before he left, by his own admission, he
12 made himself an ISIS flag. He's full of praise for radical
13 extremism, including lecturer Anwar Al Alaqui, whose lectures
14 are a well-known gateway into this way of life. And he, by his
15 own admission, devoured them before he left and took every
16 message from Alaqui had to heart.

17 He wasn't in China long. He had a number of issues
18 over there with his job. I believe he made some statements
19 about doing violence to people who insulted the Prophet
20 Muhammad, and that was just one of a number of problems. The
21 job was not a good fit for him in China. He had problems with
22 his employer, problems with his students, and he left. And he
23 was supposed to be flown back to Richmond to go back home, and
24 instead he changed his ticket to end up in Oman, Jordan. This
25 is now August of 2016. He's only over in China for a few weeks.

1 THE COURT: Can I stop you there?

2 The defendant's -- I believe it's in the defendant's
3 position paper or maybe it's yours that mentions he had told his
4 parents he was planning to go to Saudi Arabia to visit Mecca?

5 MR. BOSSE: That's correct. That's my understanding.

6 THE COURT: But that's not in the presentence report.

7 MR. BOSSE: Okay.

8 THE COURT: So was that a statement made prior to
9 going to Jordan?

10 MR. BOSSE: I believe it was on his way over there, he
11 called, he called his family and said he wanted to go to Mecca,
12 and then he didn't actually try to go to Mecca, he went straight
13 to Jordan.

14 THE COURT: Is there any dispute about the fact --
15 since I don't think it's in the presentence report, I don't
16 recall it -- but is there any dispute over that issue?

17 MR. BOSSE: I don't think there is. It's been, it's
18 in the -- it's documented, I think, in some interviews.

19 THE COURT: All right.

20 MR. BOSSE: Yeah. And I shouldn't say he went, he
21 flew to another country and then flew to Oman, Jordan, but that
22 was his destination, the Kingdom of Jordan.

23 What his intentions were there is evident from what he
24 was doing before leaving, researching how to join ISIS, what he
25 told a number of law enforcement agency and undercover

1 employees, and frankly what he says in his letter to the Court,
2 which I was in part astonished by. He was intending to travel
3 to the Islamic State. He talks about the caliphate or the
4 State, sometimes referred to as Dash. That is the Islamic
5 State. That's ISIS. The self-proclaimed caliphate, I should
6 say. And he wanted to do that, by his own admission, to do
7 jihad and shahid, which is an Islamic term for martyrdom. In
8 his own words, he wanted to do something bigger, better and more
9 purposeful to undertake jihad and seek martyrdom and die in the
10 cause of Allah.

11 When he gets there, he looks for a contact that he had
12 in Jordan, and when he can't find that contact, again, by his
13 own admission, he's riding around in cabs asking cab drivers
14 about ISIS and about a different designated foreign terrorist
15 organization, Jabhat Al Nusra, the Al Nusra Front. It's
16 designated just like ISIS is. So he misses his contact in
17 Jordan, he's riding around trying to get people's feelings about
18 these groups, the government argues, looking for his entree into
19 Syria, which he admits in his letter he was trying to get across
20 the border into the caliphate.

21 THE COURT: But in his letter he seems to suggest his
22 idea was that he would teach English by video --

23 MR. BOSSE: Yes, Your Honor.

24 THE COURT: -- and not actually fight, but perform
25 other services. Is that the way you read it?

1 MR. BOSSE: That's the way I read it, and I had a
2 section on that. I'll talk about that right now.

3 First of all, that's what he is saying now, now that
4 he is looking at jail time. That wasn't the kind of thing that
5 he was saying back in 2016 when this is happening when he talked
6 about wanting to be locked and loaded and seeking to do
7 violence. And as far as his new statements go, a lot of people
8 have this misimpression that if you go over there to ISIS, to
9 the Islamic State and, for example, you render medical aid,
10 you're helping the people who are injured over there in
11 ISIS-controlled territory for ISIS, that you're somehow exempt
12 from the laws of the United States regarding material support
13 for terrorism. That's not true. There's a single exemption
14 under the material support law, and that's for providing
15 medical, medical supplies. Anyone who goes over there to do
16 anything for the Islamic State is materially supporting an FTO
17 and is as liable as anyone who picks up a rifle to do that. Now
18 that's even assuming under his best-case scenario where he is
19 going over there presumably to teach English -- I don't, I don't
20 think the facts suggest that that's true, that's a statement
21 he's making now two years on as he's facing sentencing for this
22 crime. But even if the Court believed what he wrote in that
23 letter -- which I'll talk about in more detail, because that
24 letter is bizarre -- even if the Court believed that he's
25 basically saying he's crept right up to the line of saying I was

1 going over to do material support, frankly if we'd had that
2 letter at the time we charged this case this might be a
3 different-looking case than what ended up being charged. Let me
4 leave it there and then talk a little bit about more of the
5 things he said that, at the time he said them, make clear what I
6 think his intentions were.

7 The statements he's later making leave no question
8 that he plans to travel to ISIS territory. He said that he went
9 to Jordan rather than through Turkey because he didn't want to
10 be caught like everyone else. And if the Court will remember,
11 in this 2016 time period there were a number of news stories
12 about foreign fighters crossing the border into Syria in what
13 was at that time a rather porous border between Turkey and
14 Syria, but a number of them were being picked up. He also
15 talked about watching propaganda videos urging people to come
16 forth to your State, meaning the Islamic State, or Dash, and he
17 expressed frustration that the instructions he was reading about
18 online for how to join the State weren't specific enough. He's
19 not -- he's not unhappy that he got picked up, he's unhappy that
20 he didn't have more specific instructions to try to get over
21 there. These are not the actions of someone who is not trying
22 to join a foreign terrorist organization. That is after he
23 makes these statements to the cab driver asking his opinion on
24 these various FTOs, angling for a way to get into Syria. So
25 he's picked up by Jordanian authorities, spends a few days in a

1 Jordanian jail, and he's then deported back to the U.S.

2 These are the statements he made on his way back to
3 the U.S. or shortly after. "I wanted to commit jihad and
4 shah-id." He had nothing but praise for the terrorist attack in
5 Paris, in Nice and in Orlando. ISIS, although extreme, is
6 necessary. He said he wanted to be locked and loaded in this
7 conversation about ISIS, while being extreme is necessary. And
8 he went to Jordan to do something bigger, better and more
9 purposeful, by which he meant dying in the cause of Allah. He
10 wanted to do something glorious, he said, and make the cuffar
11 suffer. And the cuffar is an interesting term. It's a
12 derogatory term for anyone who is not Muslim. And there are
13 similar statements of dislike for people who were not Muslim.
14 Similarly he notes he doesn't care what happens to infidels. He
15 says ISIS members are true Muslims, and he discusses his desire
16 for a war between Muslims and non-Muslims and his desire to join
17 a Muslim Army and get training. After he's back, after he's
18 back, he goes up near Detroit for a few days. He actually sang
19 an ISIS fight song to an FBI undercover employee.

20 THE COURT: Why did he go to Detroit? What's the
21 evidence on that?

22 MR. BOSSE: Your Honor, my understanding is that he
23 went to Detroit to seek out --

24 THE COURT: He lands there or landed here and --

25 MR. BOSSE: He landed in Chicago and then had a ticket

1 for Detroit. My understanding is he was trying to get to --
2 there were a couple of towns in the area of Dearborn, Michigan
3 that are heavily Muslim, and that's, he -- for whatever reason,
4 he wanted to get up to those towns. And he may have also wanted
5 to meet -- there's a cleric up there that he may have been
6 interested in meeting.

7 And he meets, thankfully, an FBI undercover employee
8 who he has this bizarre and incredible, wide-ranging
9 conversation about and sings this ISIS fight song. That's when
10 he talks about having made an ISIS flag and wanting to replace
11 his neighbor's American flag with an ISIS flag.

12 THE COURT: Are you able to tell me whether these --
13 are you able to tell me whether these various referenced CHSs
14 were people that sought him out or he was seeking out? What
15 light can you shed on that?

16 MR. BOSSE: There's very little I can say about that,
17 Your Honor, about how he came in contact with these people. I
18 will say that when he landed in Chicago he was interviewed in a
19 room by FBI agents, he was shown their badges, it was a
20 voluntary interview, and then when he knew he was speaking to
21 FBI agents he still made these statements supportive of ISIS.

22 When he got up into the Detroit area, it came about
23 that he had contact with another individual who was an
24 undercover employee when he made even more statements to. And
25 it's interesting, because he was actually being careful about

1 what he said. These things sound, on paper, extreme. But he
2 was being careful. He asked the undercover up there to turn off
3 his phone so that they wouldn't be monitored. And he was
4 suspicious of the FBI, and in hindsight rightly so, obviously.

5 The Court should take into consideration as I read
6 these things out that these are statements he's making that in
7 his view are actually somewhat guarded at the time he's making
8 them. He's careful about what he says. And you can see that in
9 the letter that he wrote to the Court where he claims he only
10 wanted to go to the Islamic State so he can teach English.
11 Again, teaching English for the Islamic State is material
12 support just as much as doing anything else for that group is.
13 But that's if you accept that representation he's making, this
14 idea he's going to a peaceful part of the Islamic State, that
15 doesn't line up with the things he says beforehand: Searching
16 for how to join ISIS, complaining about how hard it is to get to
17 the self-proclaimed caliphate. His comments show his
18 intentions. For example, suggesting that Allah might bring a
19 disease on the U.S. that will kill all the cuffars. That's sort
20 of the beginning.

21 Once he gets back here to Virginia, he returns from
22 the Detroit area, I believe flies back to Richmond, and then
23 back to Williamsburg, and goes back to his family. And you've
24 seen in the paper his claim about how important it was to get
25 back to his family back in sort of arms of the supportive family

1 support structure he had, which by all accounts is an incredibly
2 close and tight-knit and supportive family, but it's after he's
3 back with his family that he's talking about wanting to blend in
4 and do something glorious -- or around the time anyway -- and we
5 have his letter now where he tries to explain away what he's
6 saying.

7 THE COURT: When you say "around the time", but
8 there's no doubt these are statements made after his return from
9 Jordan?

10 MR. BOSSE: Yes, sir. These are after his return from
11 Jordan, and now we're moving into September 2016. So now we're
12 a month and a half back from being in Jordan, and this is after
13 he's back at his parents' house for several weeks before he
14 makes his applications to the military, and he's discussing with
15 the confidential human source by text about what kinds of
16 attacks are justified and what kinds are not justified. And the
17 one thing that he's crystal clear about in his messages is that
18 attacks on U.S. military service members are justified.
19 Completely justified in my eyes, is how he describes the Nidal
20 Hasan attack. 100 percent justified. "May Allah curse the soul
21 of those two." Now, I know the Court knows, but just for the
22 oral record here, Nidal Hasan was a major in the U.S. Army who
23 murdered 13 service members on November 5th, 2009 on base at
24 Fort Hood, a base he accessed by virtue of being in the
25 military. And I think he shot over 30 other service members in

1 the attack.

2 That's the one thing -- because Mr. Patel has some
3 quibbles and qualms about, you know, at least expresses some
4 quibbles and qualms about certain of these other attacks. There
5 was a stabbing that he had some qualms about. Didn't have any
6 qualms about the Paris nightclub shooting. He expresses
7 complete and utter support for the Nidal Hasan attack. That's
8 just a few weeks before he applies to join the U.S. Army, the
9 most serious domestic attack on military service members in
10 recent years.

11 Now we get to the Army application. He lies on the
12 national security portion of the application form. Lies about
13 his previous foreign travel. Says he went on a family trip to
14 India and leaves out the China and the Jordan trips. And then
15 when he's asked to bring in his passport to confirm the foreign
16 travel, he takes further steps to continue to hide the one thing
17 he's trying to hide, which is that this is who he is, he's
18 trying to hide from the Army who he is by obscuring his prior
19 foreign travel, which is the thread that, once you pull it, gets
20 the -- you know, the FBI's interviewed him by this point, and
21 there's an interview on file with the FBI where he's talking
22 about his support for ISIS. And so this is the thing he's
23 trying to hide. And he actually takes a further step of telling
24 the State Department he lost his passport and needs a new one.
25 The prior passport has a special stamp you get when you're

1 deported from a foreign country back to the U.S. The passport
2 is no longer good for travel, it's only good for return travel
3 to the U.S. The old passport would have made clear he traveled
4 to China and Jordan and been deported from Jordan, which is, if
5 you're an Army recruiter, the single thing you care most about:
6 Is this person actually harboring not just anti-American or
7 antimilitary sentiments, but pro terroristic sentiments, which
8 was imminently the case here. He knowingly commits a federal
9 crime to try to get into the Army. He was told and the form
10 itself says if you lie on this form, 1001. He was specifically
11 told that. He knowingly committed a federal crime to try to get
12 in the Army. And then when he realizes that he's got to back it
13 up, he knowingly commits a second federal crime to try to get a
14 new passport to cover for the first lie. This wasn't a fluke.

15 He then applies to the Air Force and does the same
16 thing on his national security questionnaire. He is applying
17 for other jobs. He's applying to police departments, probation
18 offices. He's applying to a number of jobs in the area, many of
19 which involve having a gun.

20 THE COURT: So these SF-86s he submitted to the Air
21 Force deleted the same information, deleted or --

22 MR. BOSSE: Yes, sir.

23 THE COURT: -- not listed for the Army?

24 MR. BOSSE: Exactly the same information. I think
25 they're basically mirror images.

1 THE COURT: The big question, or one of the big
2 questions here in my mind is the inferences to be drawn from
3 these things. In his letter he says that -- I believe he says
4 that about the same time -- let me find it, because this is
5 important. He says "It was brought to my attention that I
6 provided false information about my travel history, like lying
7 about my passport. I lied not with malicious intent, but to
8 speed up the process. I have proof of this too. While I was
9 busy applying for jobs, I applied to a few CIA positions online
10 and disclosed my full," underlined, "travel history, and even my
11 religious history. I figured my crazy life may be of value to
12 the CIA. That's why I applied. Why would I lie on one
13 application and be honest on another? I figured the Army
14 wouldn't waste their time conducting a full background check
15 unless it was for a sensitive position. Obviously the CIA would
16 investigate me inside and out, so I disclosed absolutely
17 everything there."

18 So do you have anything you're able to share with me
19 that would corroborate or not corroborate that, and if so,
20 either way, what does that do for the inferences you and the
21 defendant are asking me to draw?

22 MR. BOSSE: It does -- that is the first that I heard
23 of it, Your Honor, was in that letter. We had no information
24 about that. I've seen no evidence of that, that he applied to
25 the CIA and disclosed his full travel history. I think either

1 way you take it, I don't think it helps him in the least.

2 And one thing we have to think about as we look at
3 that letter is this is two years on. He's looking at a
4 significant federal sentence, and this is him trying to thread
5 the needle to explain what he was doing over there in a way that
6 doesn't make it worse for him. And on its face the letter is
7 just, it's extraordinary. Parts of it are just unbelievable.
8 I'll get to parts of the letter briefly, but I'll talk about the
9 CIA part now.

10 The one thing we know are the things that he said back
11 in 2016. Those are on the record and we know he said them.
12 This is someone who talked about loving ISIS, talked about doing
13 violence, praised violent terrorist attacks and praised in
14 particular an attack, the one that he singled out for praise was
15 this attack by an Army major on his own fellow service members.
16 Weeks later, weeks later he's applying to the Army. And this
17 idea that, well, I didn't disclose everything to the Army
18 because I was trying to speed the process, he was told that it
19 was a federal crime to lie on that form, and he did it on
20 purpose.

21 THE COURT: How many weeks later?

22 MR. BOSSE: I think three, three and a half weeks
23 later. Something in the ballpark of that. Between these
24 statements.

25 And Your Honor, here's the -- thinking about this

1 claim about the CIA, let's imagine he just lied on the form and
2 done something else. He could have withdrawn his application,
3 you know. He could have backed away at that point. But he
4 doesn't. When he realizes that he's got to turn in a passport
5 to verify his foreign travel, he files a fraudulent passport
6 application. And I think that's what -- it's the two-step
7 nature. These things didn't happen all in an hour. He had time
8 to consider what he was doing, and he doubled down on the lie he
9 made to the Army. The light -- when you put that in context
10 with the statements he's making, the light that this casts on
11 this idea -- he's also applying to the CIA -- it's just, if he
12 did, it's incredible and it doesn't make sense.

13 THE COURT: So you're saying that if in fact his
14 purpose was to speed up the process and thinking that by making
15 the misrepresentation to the Armed Forces and thinking that they
16 wouldn't conduct the kind of full background check, that the CIA
17 would -- assuming what he says is true -- you're saying that the
18 inference or the statement he makes is belied by the fact that
19 he was necessarily delaying the process by having to seek a new
20 passport and go through that whole process for his applications
21 to the Army and Air Force to be fully processed. So it
22 undercuts his assertion for the reason that he did not list his
23 travel information on those applications versus his assertion he
24 did on the CIA application?

25 MR. BOSSE: I think I'm making an even broader

1 argument, Your Honor, which is that --

2 THE COURT: Do you agree with what I said, if you're
3 making a different argument? Does it undercut his assertion?

4 MR. BOSSE: It does undercut the assertion. The idea
5 that you're going to speed up the process by submitting a new
6 passport claim does undercut that assertion, certainly.

7 My broader argument is what's in that letter doesn't
8 make sense. It's internally inconsistent, and it's inconsistent
9 with the things we know he said before he had time to think
10 about the situation that he was in. It's completely
11 inconsistent with the things he's saying back in 2016 when he's
12 full of praise for this foreign terrorist organization and
13 praising attacks on military service members and then trying to
14 join the military.

15 The idea that was -- let's say it's true. I mean,
16 let's say that he's more naive than I think he is. He's a
17 college-educated man. Let's say he's also trying to join the
18 CIA. In my mind, putting aside the idea of whether he lied on
19 that application or not, that's even more troubling. This is
20 someone who to this day talks about, equates American foreign
21 policy, including the things that are going on overseas, to
22 terroristic actions. That's on the last page of the letter he
23 sent. The idea that we should be happy or that it somehow helps
24 him he was also applying to join the Central Intelligence Agency
25 is astounding to me. It's worse, Your Honor. It's not better.

1 And whatever it does for his *mens rea* for the crime that he did
2 commit that he is charged with here today, which he's already
3 been found guilty of, I think it's irrelevant. My real concern
4 was that he was also trying to join the CIA.

5 Let me pick up a little bit because I want to talk a
6 little bit about parts of the letter.

7 He's claiming in the letter that he was delusional and
8 psychotic when these things happened. There is absolutely no
9 evidence whatsoever of that. Even if he had been in some kind
10 of state at the time that he's flying back from Jordan and
11 getting back here and going through a long and very lucid and
12 cogent interview with FBI agents, the statements he's making
13 about ISIS and Nidal Hasan, they continue after he's back, and
14 they continue on for some time. After he's back with his
15 family, back in Williamsburg when he claims that things
16 normalized again. He says "Now that ISIS was out of the
17 question." But then he also admits that he was trying to join
18 the so-called caliphate. The so-called caliphate was proclaimed
19 by ISIS. The statements in that letter, he's trying to walk a
20 very fine line having to do with avoiding saying more things in
21 material support of an FTO, and I think he actually gets right
22 up to it and maybe across over it. People who don't want to
23 join ISIS don't say -- well, let me put it this way: When he's
24 over in Jordan, when he's in Jordan, at that time he's certainly
25 not saying ISIS is out of the question. He is seeking out the

1 group. By his own admission, that's how he's trying to find out
2 and get across to Syria, by asking people about ISIS and the Al
3 Nusra Front. He admits he was trying to get a ISIS territory,
4 and he tries to draw this distinction, "I believe in the
5 caliphate, but not ISIS-led caliphate. I envision a noble
6 uprising within the ranks of ISIS."

7 THE COURT: I'd like to, this is important --

8 MR. BOSSE: Yes, sir.

9 THE COURT: And this is important because you are
10 asking me for a sentence that is based upon an assertion that
11 the enhancement, the terrorism enhancement must not apply, but
12 it comes close enough that you think it's justified for me to
13 vary way up?

14 MR. BOSSE: Yes, sir. That's right.

15 THE COURT: He says "After leaving China and while on
16 the plane to Beijing, I decided to see if the so-called
17 caliphate was legitimate. On propaganda videos it was
18 illustrated as an Islamic Utopian society. The behavioral
19 experts who were behind the videos emotionally blackmailed us by
20 convincing us, the young and impressionable, that we would go to
21 hell if we stayed home. From what I read online, it would not
22 be illegal to venture into ISIS territory, it would only be
23 illegal to fight for ISIS. I didn't agree with the methods of
24 aggression that ISIS was using, so ISIS was completely out of
25 the question. Propaganda videos online expressed a call for all

1 Muslims to fight in Syria to defend the honor of innocent Sunni
2 women being raped by Basher Al Assad's Shiite Army. Many videos
3 surfaced of innocent Syrian men, women and children being
4 oppressed, tortured and killed at the hands of the brutal
5 regime. It was absolutely incumbent for me to do something. I
6 had absolutely no intent or interest in raping or pillaging
7 anyone. Nonetheless, I felt disgusted to live in peace and
8 quiet while innocents were dying in a blessed land. I decided
9 to embark upon the noble path of martyrdom for the sake of the
10 oppressed. I think if I had ever made it to ISIS territory and
11 ISIS learned of my sincere intention, they would have killed me
12 immediately. If some of the Western-backed non-terrorism
13 entities like YPG or Ahraar Ash Saam had found me, I would have
14 died a noble death in the way of justice. I prayed to God to
15 guide me to the good guys. I figured I would live near or in
16 ISIS territory and learn the local language while I earn a
17 living teaching English over the Internet. I rationed that as
18 the world came to an end, God would guide me to the true group,
19 and I would earn martyrdom. I believed in a caliphate, but not
20 the ISIS-led caliphate. I envisioned a noble uprising with the
21 ranks of ISIS with the subsequent passing of authority to a
22 just, humane non-terrorist authority. In my grandiose fantasy,
23 I was among the brave, noble men facilitating this revolution.
24 Of course to this point, had done nothing to advance this
25 fantasy."

1 So were you saying that you think this statement is
2 evidence of an intention to provide support to an FTO?

3 MR. BOSSE: Yes. I'm saying that. No. I I'm saying I
4 don't believe --I don't think -- I think the facts belie that
5 statement. That is a statement written a couple weeks before
6 his sentencing in a federal case two years after what happened.
7 I don't think in the least that that's what he was really doing
8 there.

9 I'll talk about two scenarios. One, I'll explain why
10 I don't think that even comes close to what he was doing there,
11 and two, I'll try to explain a bit more about why even if we
12 take him at his word, it's extraordinarily concerning.

13 The first thing, ISIS is completely out of the
14 question is what he says now when he's facing sentencing. His
15 searches when he was here in the U.S. were for, I think it was
16 just a search "how to join ISIS." He's over there and he's
17 seeking out people. When he can't find his contact there, he's
18 seeking out ISIS and he's seeking out the Al Nusra Front and
19 he's trying to cross over into the State, with a capital S. The
20 State means ISIS. The State means the self-proclaimed caliphate
21 by Al Baghdadi, who was the leader of ISIS, who proclaimed the
22 supposed caliphate over there. That's where he's trying to go.

23 And as far as his peaceful intentions, when he's back
24 here, even after he's back here, even after he's been debriefed
25 by the FBI, even during his debrief with the FBI, his praise is

1 for violent ISIS attacks. His praise is for the Paris attack.
2 His praise is for the Orlando attack. And his praise -- he was
3 into it. And his praise then later, weeks later, was for the
4 Nidal Hasan attack.

5 These things that he's saying in his letter, when you
6 line them up with what he know he said in 2016 before he knew
7 that he was facing the situation he's facing now, they do not
8 make any sense when you line them up together. But let's say
9 that he was actually trying to cross over to the State, to the
10 caliphate, because he wanted to teach English. I don't, I don't
11 buy that for a second. But if that is the case, he is
12 expressing his desire to provide material support to a
13 designated FTO. Teaching English for ISIS is material support
14 to ISIS by the provisioning of yourself, is the way it works
15 under the statute.

16 THE COURT: Well, he doesn't exactly say I was going
17 to teach English to ISIS, he just says teach English.

18 MR. BOSSE: Yes, Your Honor. And again, these are the
19 kinds of fine distinctions that he's able to make two years on.
20 There was certainly no question in his mind based on the things
21 he said at the time, he said them in the summer and fall of
22 2016, what he wanted to do. He was full of praise for ISIS and
23 he tried to go over and cross the border in Jordan into Syria.
24 And the reason he was trying to do that was to get to "your
25 State." Your State. He talking about the propaganda videos,

1 "Come to your State." That's not a reference to some other
2 sub-nationality, that is a reference to the Islamic State. It's
3 a reference to ISIS. That's what he was trying to do. That's
4 what he was trying to accomplish. And frankly, he's just lucky
5 he got picked up by the Jordanians when he did, because he was
6 brought back here and didn't end up crossing the border, and
7 here we are. Really, when you think about it, in the long run,
8 all to his good. Obviously no one wants to be sitting where
9 he's sitting today, but he's alive here in America and not dead
10 over in Syria.

11 Let me pick up on my notes, Your Honor. I had a few
12 other things, but I've probably talking enough for the Court, or
13 close to it.

14 The other idea in the letter, and this is just getting
15 into this letter and the things he's saying, is that his mind
16 returns to normal when he's back home. If we take him at his
17 word that that's true, then his statements of support for the
18 Hasan attack were after his mind had returned to normal. And
19 then his application to join the Army a few weeks later are also
20 after his mind's returned to normal. Again, someone who's
21 equating American government action to terrorism, trying to join
22 the U.S. Army. Those two things do not go together. Even today
23 in the third-to-last paragraph in the letter, the equations he's
24 making there do not line up with someone who wants to join the
25 Army or the Air Force or the CIA or any other government branch

1 for the reasons we want people to join and do government
2 service. The exact opposite is true.

3 We have two narratives here, and in Mr. Patel's he's
4 sort of misguided and naive and also supposedly psychotic.
5 Again, there's no evidence whatsoever of that. And his
6 narrative, the timing of his statements and the timing of his
7 application to join the military of a nation whose military
8 actions he abhors, that's all just a coincidence, and he's just
9 a peace-loving person who wanted to see what life in ISIS
10 territory was like and then come back and join the U.S. Army.
11 Those things, those things don't go together, Your Honor.

12 We have to look at the evidence that we had at the
13 time, the statements he made at the time, and weigh what he's
14 saying now two years on when he knows the situation he's in
15 against the things we know he said at the time that matters.
16 He's talking about wanting to join a Muslim army and get
17 training and looking forward to the prophesied war between
18 Muslims and non-Muslims.

19 THE COURT: So the defense paper, the defense position
20 paper references numerous pages 2 through 5.

21 MR. BOSSE: Yes.

22 THE COURT: Numerous statements made to confidential
23 human sources that, some of which are not in the presentence
24 report.

25 MR. BOSSE: That's right. They're accurate as far as

1 I know. I reviewed those relatively closely.

2 THE COURT: The suggestion being that these statements
3 contradict the statements you're citing regarding support for
4 ISIS.

5 MR. BOSSE: That is the suggestion, Your Honor. The
6 statements that are cited in the defense paper are mostly made
7 after, including into 2017, after the Army application, after --
8 I think most of them are maybe after the Air Force application.
9 The defendant was suspicious of the CHS who he was dealing with,
10 and you know, at some point he starts saying things about I'm no
11 longer a Muslim, I've lost my faith in Islam and I don't believe
12 in the things that ISIS is doing. A striking departure from his
13 full-throated belief in the things that ISIS was doing at the
14 time of the events in question in this case, which is the
15 relevant conduct that I'm talking about. Did he later
16 disassociate from ISIS in his mind? I don't know. He might
17 have. He might not have. What his state of mind is now, I have
18 no idea. That letter that he wrote isn't full of encouraging
19 things, I don't think. I'm -- I think I'm more worried after
20 reading that than I was before when I lined it up with what he
21 was saying at the time in question with the things we know he
22 said and thought and did.

23 But certainly he did make statements in the late 2016
24 into the mid of 2017 that, well, I don't really believe in that
25 stuff anymore.

1 There is an intelligence note that Mr. Clancy's going
2 to describe that talks through those statements and the
3 intelligence note surmises that he's questioning his Islamic
4 faith and extremist ideology and is focused on finding
5 employment. I didn't write this note, and it's written by an
6 intelligence analyst at the FBI. I don't give it a whole lot of
7 credence. It does say as far as the -- I should say, I should
8 couch that -- as far as what his state of mind was in the 2016
9 time period that we're talking about here. It does, it does
10 suggest that he may be disassociating, and also goes through an
11 analysis of alternates; that he's trying to go undercover and
12 seek to get this training that he's getting, try to hide his
13 extremist ideology. It also says if that he doesn't get the
14 employment he's looking for, he may revert to extremism.

15 One thing I wanted to say about the claim that he was
16 psychotic, it -- again, we go down two roads. One is I don't
17 believe it. Two is, if we take him at his word and he's not
18 medicated anymore, if he was indeed psychotic and if his
19 psychosis is slipping into ISIS/Islamist extremism, then we have
20 every concern, we have every right to be concerned that that's
21 going to happen again. I mean, both of the roads that he goes
22 down in this letter, neither ends up in a good place, and all of
23 them support protection of the public rationale.

24 THE COURT: So he gets a degree from Virginia State
25 University?

1 MR. BOSSE: Yes.

2 THE COURT: 4.0, maybe?

3 MR. BOSSE: That was true at VSU, Your Honor, not at
4 other places.

5 THE COURT: In criminal justice?

6 MR. BOSSE: Yes, sir.

7 THE COURT: 2014-ish. He has an internship at the
8 Petersburg Police Department?

9 MR. BOSSE: That's right.

10 THE COURT: So he has interest in criminal justice, at
11 least. We know that.

12 MR. BOSSE: Yes.

13 THE COURT: And he says he applied for jobs and
14 couldn't get them, and worked at the family motel, and then he
15 goes off to China?

16 MR. BOSSE: That's right. That's correct. I don't
17 know the details of the pre-summer 2016 job applications. He
18 was certainly applying when he came back here along with the
19 other places he was applying to. But I think that's right. I
20 think Your Honor summarized it correctly.

21 THE COURT: And when he was applying to the military
22 was he also applying for criminal justice jobs?

23 MR. BOSSE: He had a number of applications out to a
24 bunch of police departments, and I think a handful of probation
25 departments also.

1 THE COURT: And he didn't have to list his foreign
2 travel for those?

3 MR. BOSSE: He did not. He did not. That's right.

4 THE COURT: All right.

5 MR. BOSSE: As to employment, Your Honor, he has a
6 great family by all accounts. Everyone whose dealt with his
7 family has nothing but praise for it. Close-knit. He had a job
8 there. A job he could do. And it was a guaranteed job, and by
9 all accounts from the letters, he was good at it. And, again,
10 that's the context where we look at he's trying to move on to
11 something else and what he's trying to move on to is the
12 military, and he's doing it after these unbelievably frightening
13 things that he's saying, including the praise of the -- if
14 you're going to apply to the military, the Hasan attack, it was
15 devastating to the Army. It was its own -- it was a major in
16 the Army who did it. And the idea that this is all a
17 coincidence, it, it... it belies explanation.

18 THE COURT: He made a distinction at some point
19 between terrorist attacks on civilians and terrorist attacks on
20 military.

21 MR. BOSSE: That's right. That's right.

22 THE COURT: So if we --

23 MR. BOSSE: I'll --

24 THE COURT: -- give credence to that distinction, then
25 if he had the change of mind that he asserts in his position

1 paper, it's a switch from someone justifying attacks on the
2 military and drawing the distinction between the civilian
3 population and military population as targets for terroristic
4 attacks, and then a complete turn, 180 degrees, to wanting to be
5 a part of the military within a matter of weeks?

6 MR. BOSSE: Weeks. Within a matter of weeks.

7 And briefly, I know I've probably run over whatever
8 allotted time I had, but as far as the attacks on civilians go,
9 when he comes back from Jordan he's praising the indiscriminate
10 killing of civilians by ISIS. That thinking, if you believe his
11 texts, as it gets, as time goes on, he starts to question that.
12 And there is a -- within Islam, I don't claim to be an expert,
13 there are theological issues with the indiscriminate nature of
14 some terror attacks because some of the people you might be
15 attacking for all you know could be Muslim, could be otherwise
16 subject to conversion. There's all these -- there are all these
17 theological constructs built around attacks. And again, even if
18 you accept that, the one thing he was clear about is that
19 attacks on the military are fine.

20 And I'll probably leave it at that, Your Honor. I
21 think that's probably enough for now.

22 THE COURT: Well, you're not getting away that easily,
23 because I have some more questions --

24 MR. BOSSE: Yes, sir. Oh, yes, sir.

25 THE COURT: -- for you.

1 Again, you are saying that the Court should not
2 apply -- you have not asked me to apply the terrorism
3 enhancement --

4 MR. BOSSE: I haven't.

5 THE COURT: -- in this case.

6 MR. BOSSE: I haven't, Your Honor. You know, I didn't
7 have his letter in hand when I wrote this paper. I think he's,
8 I think he's right, skating along the edge under the fact that
9 relevant conduct includes a federal crime of terrorism, because
10 I think he's almost admitted -- very careful with his words, but
11 he's almost admitted material support. But I'm going to stand
12 by the paper I wrote. I did not seek it, and I don't seek it at
13 this time. I seek only a variance.

14 THE COURT: Okay. So you essentially say that because
15 this is close but doesn't meet the enhancement requirements
16 sufficient for you to seek it, the Court should still consider
17 the context here, and even though the Court might not be able to
18 conclude by a preponderance of the evidence that those
19 enhancement criteria are met, the Court should nonetheless vary
20 from, what is it, eight to 11 months?

21 MR. BOSSE: Eight to 14 months.

22 THE COURT: 14 months --

23 MR. BOSSE: Yes, sir.

24 THE COURT: -- the current guideline range, up to 96
25 months?

1 MR. BOSSE: 96 months, Your Honor. Eight years.
2 That's the government's request.

3 THE COURT: Okay. So you cite in your position paper
4 a case that suggests that -- just an observer of this might say,
5 wait a second, the government is asking the Court to punish
6 someone for their thoughts. And you cite a case that addresses
7 that, don't you?

8 MR. BOSSE: Well, I don't, I don't -- I'm not asking
9 the Court to punish Mr. Patel for his thoughts. But we did cite
10 a case about the expressions that people make that may otherwise
11 be subject to First Amendment protections can certainly be
12 weighed in the balance when you're analyzing the relevant
13 conduct; not just the *res gestae* of the crime, but the relevant
14 conduct of the crime, including part of the materiality
15 analysis, yes.

16 THE COURT: Okay. So you're essentially asking me to
17 focus on the intended outcome of the unlawful acts here; that
18 is, what the activity was calculated to accomplish, and not so
19 much what his claimed motivation behind it was?

20 MR. BOSSE: I think that's right, Your Honor, as far
21 as the enhancement. We were talking about the enhancement in
22 part to show that he's on the razor's edge from a guidelines
23 range that is, I believe it would be restricted at -- it would
24 be restricted at the statutory maximum, and he's on the razor's
25 edge with that. And that's just one of the factors that shows

1 that this is not a typical 1001/1542 case. The reason I'm
2 asking for a variance in this case has to do with his conduct
3 and his relevant conduct to the case and all the 3553(a)
4 factors. I'm not saying, well, the enhancement almost applies
5 so you should meet it somewhere in the middle. That's not what
6 I'm saying. I'm saying that the fact that the enhancement
7 almost applied shows how serious the conduct is. And we're not
8 asking for the enhancement. What I'm saying is considering the
9 relevant conduct, considering what he did and what, and what he
10 did before, the lies that he told the Army and the Air Force,
11 the travel over to attempt to go to the Islamic State, that all
12 has to be considered. And we do the same 3553(a) factor
13 analysis we normally do, and here, protection of the public and
14 deterrence weigh strongly in the government's mind, and that
15 considering all these things, then an upward variance, a
16 significant upward variance is appropriate. That's the
17 government's argument.

18 THE COURT: Okay. So notwithstanding the fact that
19 you believe the evidence here does not merit the terrorism
20 enhancement, your position is that this Court can look to the
21 intended purpose these two criminal acts to which he's pled
22 guilty, and look to the evidence before it regarding the trip to
23 Jordan, the statements, the ISIS focused activity, and conclude,
24 therefore, that when the 3553(a) factors are applied to the two
25 crimes to which he pled guilty that the sentence that is

1 appropriate; that is, sufficient to accomplish all the purposes
2 of sentencing but not greater than necessary to do so, is this
3 96-month sentence, and further that that sentence is appropriate
4 because the purpose -- because this Court can conclude that the
5 purpose for doing these two acts was very different than the
6 mine-run guideline case?

7 MR. BOSSE: Yes. And --

8 THE COURT: So.

9 MR. BOSSE: Sorry.

10 THE COURT: So if that's the case, tell me, do I have
11 to -- do you believe I have to conclude by a preponderance of
12 the evidence what the purpose was for doing these things? And
13 if I can say that by a preponderance of the evidence here the
14 purpose was to facilitate these terrorism kind of activities,
15 then why wouldn't -- why would that be different than your
16 conclusion that you can't get to the terrorism enhancement?

17 MR. BOSSE: Let me take -- there's a lot there, Your
18 Honor. Let me try to take it a step at a time. I'm trying to
19 make notes as you were putting the hypothetical to me.

20 I think there's two things that the Court can do here.
21 We're talking about the crimes of conviction and we're talking
22 about the relevant conduct of those crimes of conviction. And
23 when I'm asking for a variance I'm thinking not -- I'm thinking
24 of the relevant conduct running in two directions. I'm thinking
25 of the relevant conduct running backwards from the time of the

1 crimes and looking at what Mr. Patel was trying to cover up.
2 What he was trying to cover up was that he went over and tried
3 to go to ISIS. So that's the backward-looking relevant conduct.
4 And that, I think, if there were a preponderance -- if the Court
5 had to make any findings by a preponderance, I think that's
6 relatively easily done based on what's the in record.

7 The other --

8 THE COURT: On the backward-looking conduct?

9 MR. BOSSE: Yes, sir.

10 THE COURT: Okay.

11 MR. BOSSE: The other portion I'm looking at is
12 thinking about the lies that he told to try to join the
13 military. There is a forward-looking aspect to this case. It
14 falls under the aegis of relevant conduct, and that is this is
15 someone who is supporting service members being killed by their
16 own fellow service members who is then immediately -- and who
17 has this affinity, a stated affinity at the time, of ISIS and
18 actually took a step of going to Jordan, which is an incredible
19 step. And when we have the *mens rea* locked here, Your Honor.
20 In a domestic case like this, the person is normally arrested at
21 the airport. Then don't actually make it over to Jordan or far
22 less, Syria. So that's the person we're dealing with who is
23 lying to the Army. And it begs the question: What is he lying
24 for? And the government's view is that he was lying because he
25 wanted to join the Army and get the kind of training and

1 firearms experience that the Army affords, and possibly carry
2 out the same kind of attack that he'd espoused and validated and
3 said was completely justified. Why else is someone trying to
4 join the United States Army? Whether the Court could make that
5 kind of forward-looking finding by a preponderance of the
6 evidence, I don't know. I think, I think that's what happened
7 and I think that's the only rational explanation, when you put
8 all the facts together, that's the only rational explanation for
9 what happened.

10 As far as what his forward-looking intent was, whether
11 that is a finding that would -- I'm not sure the Court would
12 have to make a finding by a preponderance that would -- make a
13 finding about for certain what his future intent was. The
14 problem is that someone who is an ISIS supporter and sympathizer
15 is trying to lie his way into the Army. And so I guess to the
16 extent there's any question about findings that have to be made,
17 I would point to what it is he's trying to obstruct, which is
18 the relevant conduct that made the misstatement material.

19 And the fact he's trying to lie his way into the Army
20 after praising an attack by another Army service member on his
21 fellow service members, goes into the 3553(a) factors as one
22 factor among many that the Court has to consider. This is
23 someone who has evinced the kind of future dangerousness that
24 the Court takes into account when it looks at the need to
25 protect the public and specific deterrence.

1 THE COURT: Okay. Thank you, Mr. Bosse.

2 MR. BOSSE: Thank you, Your Honor.

3 MR. CLANCY: Judge, you had asked, when the statement
4 was made by Mr. Patel about making the distinction between
5 unsure about targeting civilians and then praising, and I'm not
6 as deft at pronunciation as my friend Mr. Bosse, but that was on
7 September 23, September 24 to the CHS. The statement was made
8 he's unsure about -- this was turned over to me in discovery --
9 "Patel states he is unsure about targeting civilians, but
10 believes that adult male combatants can be targeted." And then
11 he goes on to say, "States that the only attack he feels was
12 truly justified was the Fort Knox attacks." That references the
13 2009 attack.

14 So that was September 23, September 24.

15 Judge, it's very clear to me that you have grasped, as
16 I knew you would, because you always do, perhaps far more than
17 counsel, the concerns here. I have attempted to set forth in my
18 position paper, kind of contrary to what the government
19 predictably put in their position paper, the events leading up
20 to China and to Jordan, to being arrested, to being transported
21 to Chicago, to Detroit and then to home are set forth in the
22 government's position paper. What I attempted to set forth for
23 the Court's consideration is the part two of the story, if you
24 will, and that is the government had kept a CHS in close
25 contact, and understandably so, upon Mr. Patel's return to

1 Williamsburg. And we all agree that when he returned in early
2 September 2016, after his return he maintained regular
3 communications with this CHS, this contact. And those have been
4 turned over in discovery and they have been highlighted by the
5 government's position paper. And what I attempted to provide
6 that, beginning October 31, 2016, Mr. Patel, his tenor and his
7 comments and his thoughts and his indeed, perhaps even his
8 beliefs, were changing perhaps even to 180 degrees. And those
9 begin October 31, 2016. And I appreciate my friend Mr. Bosse
10 confirming that we summarized even with grammatical errors and
11 words missing accurately what he's transmissions and
12 communications were between the CHS and Mr. Patel. And those
13 continued.

14 The operative date he makes the phone call to the
15 United States Army on November 30th, 2016, that's borne out in
16 the presentence report, I believe, and the statement of facts.
17 He actually meets with the United States Army recruiter on
18 December 13th, 2016. Two days later, makes application for
19 the -- makes a fraudulent application for a replacement U.S.
20 passport and on January 30th, 2017, meets with the Air Force --
21 or makes a phone call to the Air Force recruiter or meets with
22 the Air Force recruiter and makes the same offense. That's the
23 count that was dismissed, or about to be dismissed. Mr. Patel
24 was under a very short leash, if you will. He was watched very
25 carefully and monitored by this CHS who, as I said, is working

1 and trying to get, extract as much detail and as much
2 information from Mr. Patel.

3 And I find it interesting to note that finally near
4 the end in early March, 2017, Patel's talking about he just
5 doesn't have, he doesn't -- he's got a lot of thoughts, there's
6 a lot of theories and a lot of good reasons to debunk Islam, and
7 the CHS at the very end of that communication gives Patel a link
8 to a website to answer questions about his religion, and again,
9 that's a very pro-Islamic, pro-ISIS, if you will, website that
10 my client did not go to, did not explore, did not try and
11 reacquaint himself with that text or that ideology.

12 The Defense Exhibit 1 that I provided you, I would
13 highlight a couple of points if I could. This is the FBI's own
14 assessment of Mr. Patel. And the first one, the first one is
15 dated March 31, 2017 and it begins -- and I know it's completely
16 redacted, but I trust my friend Mr. Bosse, I know that these are
17 the important conclusions, "It's likely Patel is appearing to
18 disassociate himself from any effort supporting or advocating
19 the overthrow of the U.S. government." That's the FBI own
20 intel.

21 THE COURT: What page?

22 MR. CLANCY: On the very first page, the very first
23 paragraph that's not underlined or not redacted. And we had,
24 "We make this assessment" and he makes that assessment. They
25 say, "with medium confidence." They're going to tell us what

1 that means in just a few minutes. And they talk about Patel at
2 the very bottom of this page how he had been a recent convert to
3 Islam, he had some mental health issues, and obviously they have
4 a myriad of reasons to be watching him, and had been watching
5 him very carefully from the beginning of September 2016 through,
6 now, March of 2017.

7 You go to the second page. As of March, 2017, the FBI
8 assesses that it is likely Patel was no longer claiming be to a
9 Muslim and was questioning his Islamic faith and beliefs. This
10 switch is in drastic contrast to previous behavior of Patel's
11 support for ISIS and the Muslim faith."

12 Then, Judge, I would invite the Court to review some
13 of the corroborative details of why the FBI came to that
14 conclusion. And I'm not going to read them, they're set out
15 there for the Court's consideration. They are actually provided
16 in more detail than I could provide if my position paper.

17 THE COURT: And when were the, once again, the
18 applications?

19 MR. CLANCY: The application to the United States
20 government was made on December 13, 2016. The Air Force was
21 January 30, 2017. The passport application was two days after
22 meeting with the United States Army. That would have been on
23 December 15th, 2016.

24 THE COURT: What do you say about Mr. Bosse's
25 suggestion that it's appropriate for the Court, notwithstanding

1 the fact that the terrorism enhancement doesn't apply -- if the
2 terrorism enhancement applied you would be looking at a
3 guideline range of hundreds of months?

4 MR. CLANCY: We would be maxed out right now. We
5 wouldn't be talking --

6 THE COURT: But his suggestion notwithstanding the
7 fact that the terrorism enhancement is not being sought by the
8 government, not suggested by the probation office, but that it
9 was -- it's arguably a very close call, he says I can still look
10 to the, essentially look to the purpose behind the false
11 application to the Army and the false application to the
12 Department of State as of the time that they were done, that
13 those applications were submitted, considering what had happened
14 before to conclude that the purpose was to facilitate or further
15 his activities suggested by his earlier statements. That's the
16 backward-looking argument.

17 MR. CLANCY: I understand. And the forward-looking
18 argument is he's going to -- and the FBI addresses it -- he's
19 going to, I guess, melt into the Army or the Air Force or law
20 enforcement and wreak havoc. So those are the two perspectives
21 I think Mr. Bosse is going with.

22 THE COURT: And you're kind of focusing here on the
23 forward-looking and debunking the forward-looking and saying
24 even the FBI concluded it was likely that he was stepping back
25 from his Islamic faith -- and not to suggest that just having

1 Islamic faith is an issue -- but Islamic faith and the, any
2 terroristic contortions of that faith.

3 MR. CLANCY: How about terroristic communications of
4 that faith?

5 THE COURT: Okay.

6 MR. CLANCY: I would respond, since the Court is
7 certainly, has considered the forward-looking argument in
8 responding to Mr. Bosse's request that you look backwards.
9 Isn't that exactly what the terrorism enhancement does? As I
10 understand the terrorism enhancement, it applies to any offense
11 that involved or was intended to promote a terrorism crime. And
12 if it's not applicable *vis-a-vis* the probation department, if
13 that is not being sought by the United States government, then
14 why are we -- respectfully -- why would we argue it?

15 And what I understood between the dialogue between you
16 and Mr. Bosse is, well, if it's close, then maybe I'm allowed to
17 apply it. And I'm not sure, respectfully, that that's correct.
18 I think a variance -- the way I understand variance, and I think
19 the government cited the Gall case and they provided the Gall
20 case, and the Court knows that case better than I, the Gall case
21 talks about the propriety of applying a variance. In that case,
22 it was a downward departure variance, pretty substantial
23 downward departure variance pretty early post Booker, but they
24 talked about the various -- whether it's upward or downward, it
25 just has to be reasonable. So I guess the inquiry, Judge, would

1 be is it reasonable to apply the terrorism enhancement in fact
2 even though at law we're not?

3 THE COURT: Well, you wouldn't be -- would you really
4 be applying it in fact because you're not taking him to 360
5 months or whatever that point is if you find that his -- if the
6 Court finds that his purposes in making these false applications
7 was because he wanted to in some way further his previously
8 stated views?

9 MR. CLANCY: I agree. And that would be prospective
10 only. Not going backwards.

11 THE COURT: Well --

12 MR. CLANCY: That's why --

13 THE COURT: It looks at the purpose -- yes, but it's
14 different. It looks at the purpose, his purpose at the time
15 that he made these false statements. In other words, you could
16 make a false statement on an application to the Army because
17 you, for example, don't want them to find out that you went to
18 some country and engaged in some non-terroristic nefarious
19 activity. You could make the statement on the passport -- and
20 you could make the statement because you wanted it to move
21 faster. You wanted to be able to get into the Army right away.
22 It's still a false statement. That's very different than making
23 the statement in the context of all -- making these two false
24 statements in the context of all his prior statements about
25 support for terrorist activities and views and martyrdom and --

1 so that's -- is that not a distinction?

2 MR. CLANCY: Yes. But I -- are you going forward?

3 Are you adopting the, we'll call it the Bosse forward argument?

4 Because the Bosse -- that would be the only way that I think

5 that your analysis could make sense. In other words, his

6 motivation for these, for making this false statement would

7 somehow align himself or be consistent with some of his previous

8 comments and behavior beginning I guess July/August, 2016.

9 THE COURT: As of the moment he made the two false

10 statements.

11 MR. CLANCY: Yes, sir. And it's my contention that as

12 of the moment he made those two false statements, they may well

13 have been nothing more than an attempt to get into the Army

14 and/or Air Force faster.

15 THE COURT: The letter that your client has written

16 puts a different spin on this, but it -- it adds information

17 too --

18 MR. CLANCY: It does.

19 THE COURT: -- to what the Court has before it in

20 reaching these or analyzing the government's request for an

21 upward variance.

22 MR. CLANCY: I will say that my client, it was

23 important to my client, as he's been sitting in the jail cell

24 all these months, to figure out where he was, how he got there,

25 and why he got there. And I think that letter was his attempt.

1 And when clients allocute, when clients want that opportunity,
2 they should have that opportunity. So you are reading the
3 unvarnished truth as best as he could figure it out as to how he
4 was in this place so many months ago, and where he is now and
5 how his thinking and thought process has evolved. And I don't
6 doubt that he could be criticized for trying to walk a fine
7 line, but he's trying to figure out why he was in that place and
8 what his thought processes were.

9 THE COURT: What about this CIA --

10 MR. CLANCY: Yeah.

11 THE COURT: -- issue?

12 MR. CLANCY: He told us about that at the time of this
13 allocution. I trust if there's any proof of that, the
14 government would have that. I don't think it was a big secret
15 to -- when he applies to the Williamsburg Police Department
16 which is one of the agencies he applied to, the Suffolk Police
17 Department, while they may not have known about -- certainly
18 don't investigate foreign travel, it wasn't a secret in
19 Williamsburg.

20 THE COURT: You're saying the government knew about
21 his assertion that he applied to the CIA before he saw this
22 letter?

23 MR. CLANCY: No. No. I'm not saying that at all.
24 I'm saying we cannot -- I can't confirm that. I don't have
25 access to that. I can't confirm that. It's the first --

1 respectfully, that's the first I've heard about it. And perhaps
2 that's counsel's fault for not discussing that with him. But I
3 think it's telling about it was no secret that he was returned
4 and under investigation and he knew -- I mean, the FBI came to
5 talk to Mr. and Mrs. Patel, his parents, in September of 2016.
6 They executed a search warrant two separate places: The hotel
7 and the apartment Mr. Patel had been living in previously, and
8 the family home. The FBI had maintained contact with Mr. and
9 Mrs. Patel. So there was no secret that he was, that they
10 were -- he was being watched at least at the very beginning.
11 And he's trying, even then -- and I think that's borne out in
12 the government's paper about his -- and in the presentence
13 report trying to find law enforcement jobs, as menial as they
14 may be. There's a discussion somewhere about wanting to find a
15 job as a 911 dispatcher. He can type 70 words a minute and
16 still couldn't get that job. And that would be consistent with
17 what he tried to do in 2014 with Ms. McKenzie from the
18 Petersburg Police Department. That's one of the letters that
19 you have.

20 So I guess I just want to emphasize to the Court, and
21 since I couldn't and didn't file the FBI, this is the FBI's own
22 position paper, position paper on the dangers and liabilities of
23 Mr. Patel, and I wanted to go through this with you very
24 briefly, Judge.

25 Page 2 of that report just gives more examples, even

1 more than I could file in my position paper, as to why Patel's
2 no longer claiming to be a Muslim. He was questioning his
3 Islamic faith and beliefs. The following page says "In February
4 of 2017, claims Islam is not a divine ideology, according to a
5 source." And it goes on in March of 2017.

6 What's important is that at Page 4 of this report --
7 this is the FBI's own report, and I would direct the Court's
8 attention to the top of Page 4 -- "FBI Norfolk assesses it is
9 likely Patel is seeking employment with federal, state or local
10 government institutions for reasons other than terrorism."
11 That's the government's investigation. Justice Department,
12 FBI's investigation and conclusions.

13 Then he goes on to explain why they come to that, and
14 I would invite the Court to review those documents. In fact, he
15 goes on to say in the third dotted paragraph, Judge, "He
16 indicates his interest in being an officer because he, quote,
17 just wanted to work for 25 years, live on the benefits and the
18 retirement," end quote.

19 And then it goes on to say, I do quote this, "The FBI
20 Norfolk's judgment that Patel is leaving behind his Muslim faith
21 and seeking out employment in federal, state on local government
22 institutions is not consistent with" -- something's redacted --
23 "judgments and reporting regarding ISIS-inspired individuals
24 attempting to gain employment with a U.S. government
25 institution." Again, that's the FBI's analysis. And they're

1 privy to all the CIPA-protected discovery, some of which we
2 don't even have access to, as evidenced by what's been redacted
3 in Defendant's Exhibit 1.

4 Then it talks about the alternative theories. First
5 one I think is Bosse's theory. I'm at Page 6, Judge. The first
6 paragraph that's not redacted. That would be Mr. Bosse's
7 theory: That he wants to get into the military to wreak havoc
8 similar to what he said, communications only, in September of
9 2016.

10 THE COURT: It looks like the ink is almost gone on
11 mine.

12 MR. CLANCY: I had to highlight mine so I could read
13 it.

14 THE COURT: Well, I can't really read some of these
15 words.

16 MR. CLANCY: Okay, Judge. Can I --

17 THE COURT: If there's something you want me to see,
18 you'd better read it.

19 MR. CLANCY: I'll read it. It says "FBI Norfolk
20 assesses one alternative is that it is possible Patel's interest
21 in law enforcement and the military is derived from an interest
22 to receive weapons and paramilitary training in order to conduct
23 an attack. Patel's employment would also allow him to gain
24 tactics, techniques and procedures to cause mass casualties and
25 damage. Patel would also gain access to both hard and soft

1 targets, and possibly the ability to recruit other like-minded
2 individuals."

3 THE COURT: So that's Alternative No. 1?

4 MR. CLANCY: It is. And since you can't -- do you
5 want me to keep reading, Judge? I had to highlight --

6 THE COURT: I can read this next paragraph.

7 MR. CLANCY: Thank you. It's similar to Paragraph
8 No. 1.

9 THE COURT: That's about carrying out an attack and
10 hiding his extremist ideology.

11 MR. CLANCY: Correct. Then Paragraph 3 I think was
12 touched on by Mr. Bosse in his report or position paper: This
13 is all a ruse.

14 And then after that analysis, those alternative
15 theories, the FBI Norfolk, the first full paragraph, "FBI
16 Norfolk assess these hypotheses as remote due to" -- we're
17 blacked out -- "Patel indicating no intent to carry out an
18 attack. Should Patel believe he is under FBI investigation, FBI
19 Norfolk assesses that he would no longer pursue a career with a
20 U.S. government institution and raising his profile back toward
21 his extremist ideology." So they don't even think the ruse
22 theory holds any water.

23 The final page, Page 9, Judge --

24 THE COURT: What do you do with "Outlook"?

25 MR. CLANCY: Well, it's, it's an outlook that says if

1 he doesn't get a job, I guess it basically says we need to watch
2 him. I think I'm paraphrasing that correctly. They make that
3 assessment based upon "The timeliness of Patel's employment
4 processing and the fact he has almost no chance of obtaining
5 these positions.

6 "Patel may believe his religion and extremist ideology
7 to be a hindrance to his ability to find work. Continued
8 cooperation with the U.S. military and law enforcement agencies
9 could identify Patel's probable extremist ideological --
10 ideology beliefs," sorry.

11 It's our contention that if you examine what he starts
12 saying on October 31, 2016, he no longer has this ideology.

13 Page 9 of this report, Judge, is just -- they define
14 what it means by Likely or Probable. I guess this is their own
15 risk assessment. And Page 10 defines Medium Confidence. That's
16 the phrase I used when I first began.

17 THE COURT: Okay. So if there's something of
18 particular interest you want me to focus on, you need to tell
19 me.

20 MR. CLANCY: Yes, sir. Medium Confidence. Remember
21 the first thing I said to Your Honor? They felt that -- they
22 say "With medium confidence, Patel is appearing to disassociate
23 himself from any efforts supporting or advocating the overthrow
24 of the U.S. government." That was the first paragraph of this
25 report. And they define Medium Confidence at Page 10 as

1 "Generally means the information is credibly sourced and
2 plausible, but not of sufficient quality or corroborated
3 sufficiently to warrant a higher level of confidence.
4 Additional reporting or information sources have the potential
5 to increase the FBI's confidence levels or substantially change
6 analytic judgment."

7 This report was on March 31. March 31, 2017. The
8 following report April 7, 2017, is the exact same theory, the
9 exact same conclusion: That "He's appeared to disassociate
10 himself, and we make this point with medium confidence. And we
11 make this based upon reporting from collaborative sources with
12 excellent access, law enforcement officers from other law
13 enforcement agencies." So that's what I meant by prospective.
14 The prospective analysis.

15 Judge, I think when you examine the 3553 factors, I
16 don't think -- and so the only way we can do this, the terrorism
17 enhancement we all concede does not apply, or certainly not
18 being advocated, so there's no finding the Court needs to make
19 by a preponderance of the evidence or otherwise. So the only
20 issue is whether a variance is reasonable or not under the 3553
21 sentencing factors.

22 The government, I think, and I don't want to speak for
23 Mr. Bosse, but the government will say, well, eight years is
24 sufficient when you consider the 3553 factors, and I would
25 suggest it is patently unreasonable. I think what sentence is

1 sufficient but not greater than necessary to accomplish the
2 goals of sentencing as set out in 3553(a), the one that the
3 government is zeroing in on is, I have to assume if he's asking
4 you to walk up to the terrorism enhancement but don't cross it,
5 has to be protection of the community from Shivram Patel.

6 THE COURT: He's also -- No. 1 is nature of the
7 offense, and they have said, you know, this is not a mine-run
8 kind of making false statements case. So when you look at the
9 nature and circumstances as a whole, I think they're suggesting
10 that supports an upward variance. And they're suggesting it
11 also bears on the seriousness of the offense; the, as they said,
12 the *res gestae*, the facts that are part and parcel of him making
13 these statements. And it factors into deterrence.

14 Now, what you have pointed out about the confidence of
15 the FBI with respect to what happened in 2017 and where he was
16 then, changes -- may change the deterrence analysis, but I'm not
17 sure that it undermines the government's argument about things
18 like the nature and circumstances of the offense and the
19 seriousness of the offense at the time it was committed. And
20 particularly those two.

21 MR. CLANCY: Yes, sir. And that probably does zero in
22 on those two. And would an eight-year sentence be reasonable
23 under the Gall analysis of the variance? And I would submit it
24 would not. Now, obviously I've asked you in my position paper
25 for a sentence within the guidelines. But I understand, I

1 understand your, your difficulty in working through this for the
2 last hour and 40 minutes.

3 THE COURT: I'm going to let you all have a break
4 before we impose sentence. But you know, the bottom line is
5 that we have somebody who has not, I guess you might say from a
6 conspiracy standpoint, has not taken an overt act. We don't
7 have a, arguably an overt act. You know, had he sent fifty
8 dollars to ISIS, we have a very different case. Instead, he
9 went to Jordan, telling his parents he was going to Mecca, asked
10 these questions having done all these searches and comes back,
11 makes all these statements, and then within three, three and a
12 half weeks of praising Major Hasan, is filing these
13 applications.

14 MR. CLANCY: A little more than that, Judge. About
15 eight weeks. About eight weeks later he's filing applications.
16 I think I said -- didn't I say September? September 23,
17 September 24 were the statements involving --

18 THE COURT: The government said three and a half.

19 MR. BOSSE: I was wrong with three and a half. I
20 looked through the papers. The contact was made with the Army
21 recruiter's office almost exactly five weeks after the statement
22 was made and then he went in later to actually fill out the
23 application.

24 THE COURT: Okay.

25 MR. BOSSE: The five instead of three and a half from

1 my perspective.

2 MR. CLANCY: I agree. November 30th the call was made
3 to the recruiter, December 13th was the meeting.

4 THE COURT: That's what we have, and that is the
5 larger picture of the nature and circumstances surrounding the
6 false statements that form the basis of these two crimes. And
7 although the complete nature and circumstances may not justify
8 the enhancement, it doesn't mean I can't look to those, the
9 nature and circumstances. I may not be able to -- I may not
10 conclude that those -- that by a preponderance of the evidence
11 reaches point of applying the terrorism enhancement, but it
12 doesn't mean I can't look at it in assessing all the 3553(a)
13 factors, does it?

14 MR. CLANCY: Well, no. That's why I started my
15 discussion with Gall. The only test on variance, since we're
16 not dealing with a preponderance of evidence on the application
17 of the terrorism enhancement is consideration of the factors and
18 whether a variance is reasonable or not. Perhaps I'm assisting
19 the government. It's a lesser threshold.

20 THE COURT: I just want to make sure I understood the
21 argument.

22 All right. Mr. Bosse, I'll give you just a minute or
23 two, then we're going to take a short recess before sentencing.

24 MR. BOSSE: Thank you, Your Honor.

25 I want to talk briefly about that intelligence note.

1 Your Honor has it and can review it. The context that I think
2 is important is there are statements that Mr. Patel is making in
3 this same late 2016 time period that he is, he is suspicious of
4 the person he's dealing with and he has a concern that he could
5 be law enforcement. And the statements sort of change as time
6 goes on. Whether they change because of that, whether they
7 change because Mr. Patel is riding this roller coaster and he's
8 temporarily off of this extremist stuff that he had supported a
9 few months prior, I don't know, and it's hard to say.

10 THE COURT: But it appeared to give the FBI a medium
11 level of confidence.

12 MR. BOSSE: It gave an analyst within the FBI. I work
13 with the counter terrorism section. This is a different group
14 within the same house. It's an intelligence analyst, it's not
15 the people working the case. I'll leave it at that. That
16 document is what it purports to be.

17 The entire thing makes clear that the concern is that
18 he would reengage with extremism as time went on if he found the
19 FBI was investigating him or if he didn't succeed in finding a
20 job, and that's laid out in the document as well, along with the
21 alternative scenarios that are the government's, what I describe
22 as the forward-looking concern.

23 Briefly, I know we've spent some time here, it's the
24 relevant conduct that he's intending to cover up that is of
25 concern. And that is that he actually went over and tried to

1 cross over into the Islamic State. I've had a case where a guy
2 gave small amounts of money to ISIS, and because of the vagaries
3 of the way these types of laws are written, that is looked at
4 very differently than the case and statutes we charged here.

5 But in this case I just note the overt act in a
6 traveler case is the actual travel or the attempt to travel. We
7 didn't charge it here, but he got, he got right to the doorstep,
8 and again, is lucky -- he's lucky things worked out the way they
9 did, although I'm sure it doesn't seem like that sitting here
10 today.

11 As far as the enhancement versus not the enhancement
12 and the way the guidelines work, I think we probably could have
13 sought -- and certainly at least could have sought the
14 enhancement. I made the decision in consultation not to seek it
15 and to try to get at what I thought was a sentence that's going
16 to fulfill all the 3553(a) factors the way we did it rather than
17 seeking to max out Mr. Patel in this case.

18 The relevant conduct here is concerning.

19 Specific deterrence I do think is still a
20 consideration. Even if the Court reads things the way defense
21 counsel reads it, even so, general deterrence is always in
22 effect here. This is someone who tried to hide who he was to
23 the Army to join the Army, and the thing that he was trying to
24 hide was the thing they would most want to know. Unbelievably
25 concerning.

1 That's all I have, Your Honor.

2 THE COURT: All right. We'll take a short recess.

3 (Recess taken from 11:48 a.m. to 12:03 p.m.)

4 THE COURT: One thing, those dates, I just want the
5 record to be clear, five weeks between the telephone call and
6 the statements? Mr. Clancy said November. That's not five
7 weeks, I don't think.

8 MR. BOSSE: Your Honor, the...

9 Yes. That's right. That's more than that. I skipped
10 a month. It's about nine weeks.

11 THE COURT: All right.

12 MR. BOSSE: Yes, sir. November 30th. Yes, sir.

13 THE COURT: And on this one documents that Mr. Clancy
14 submitted, it's on Page 6. So counsel, you all come up and look
15 at it afterward and let's get that page fixed somehow after
16 we're all done. Substitute it in there. And you read the one
17 paragraph that I was unable to. The rest I can make out.

18 So if there are no more, if there's no more argument,
19 I think I'm ready for, Mr. Clancy, you and Mr. Patel to step to
20 the podium.

21 Mr. Patel, I've read your letter carefully, and you do
22 have a right to make a statement. You don't have to, it's up to
23 you whether you want to make any further statement, but if you
24 wish to do so, I'm happy to hear from you. Do you wish to make
25 any further statement?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: All right. Go ahead.

3 THE DEFENDANT: I'm terribly sorry for everything that
4 I've said and done. I apologize to my family, my friends, my
5 community and my country. Thank you, Your Honor.

6 THE COURT: All right. Thank you, Mr. Patel.

7 Mr. Clancy, is there any reason that sentencing should
8 not take place at this time?

9 MR. CLANCY: No, sir.

10 THE COURT: Before sentencing, the Court will review
11 the statutory sentencing factors, which are designed to ensure
12 that the sentence imposed is sufficient but not greater than
13 necessary to comply with the purposes of sentencing. And I'll
14 consider -- I've considered all of them, but I'll recite many of
15 them.

16 I've also considered the arguments carefully about
17 where the sentence should fall, and whether the sentence -- the
18 Court should impose an upward variance, and if so, the degree to
19 which that should be done.

20 First the nature and circumstances of the offense.
21 That's factor one. We've talked about that an awful lot. At
22 the very least we have, you know, we have someone who was
23 visiting the websites, making statements and, you know, goes to
24 China, then leaves, goes, telling his parents that he's going to
25 go to Mecca, but goes to Jordan. And that fact right there is

1 very interesting, because although, as the defendant points out,
2 he had grown up in the Hindu faith and there was some
3 consternation in the family by virtue of the fact that he had
4 shifted to the Muslim faith. He was, I guess, at least
5 straightforward enough to tell his parents that he was going to
6 go to Mecca. So if you were trying to -- if you were saying
7 that to hide from them that you had some interest in Islam, it
8 doesn't seem to do that. It seems that it would be done for
9 some other more nefarious purpose; i.e. because the defendant
10 was thinking of, as he says in his letter, looking at the
11 possibility of going to Jordan to make his way to the outskirts
12 of the caliphate, the Islamic State caliphate, at the very least
13 the outskirts, I think is the way it may be mentioned in the
14 letter to help to become a martyr, eventually, as the defendant
15 says in his letter. And it's difficult to thread the needle,
16 you know. The defendant seems to seek to thread the needle in
17 his letter. And I'm sure that after the fact you're trying to
18 go back and figure out what was going through your mind, why you
19 did some of these things, why you said some of these things. Of
20 course it must be taken with a grain of salt. It's difficult
21 for the Court to know whether this is a calculated statement
22 intended to deceive the Court and/or to shed the most light on
23 what was going through your mind at the time and what your
24 intentions were, or whether it is something else.

25 But those facts are -- some of those facts that I just

1 recited were from the letter that comes after the fact. But
2 taking the relevant portions of that letter and the statements
3 made about what was happening, what the defendant's intentions
4 were at the time that he was going to Jordan all paints a
5 picture of the nature and circumstances of the offenses here.
6 Because these offenses come in the wake of it. After all of
7 that.

8 And so the nature and circumstances of activities are
9 very different than someone who lies on their application to the
10 Army or the Air Force -- I know we're here, we're dealing with
11 the Army, but we're looking at all the facts -- but someone who
12 lies on the statements they make to the Army and to the
13 Department of State because they got in some barroom brawl and
14 got arrested while they were overseas, or they were found with
15 some narcotics, for example, or they were possessing or using
16 something, I mean, there's a whole lot of reasons why someone
17 might do it, but you can't divorce yourself here or in any case
18 from the context of the crime and the reason, the purposes
19 behind it. And at the very least here, it was done to keep the
20 Armed Forces and the, derivatively at least, the Department of
21 State, from finding out about this specific incident in Jordan.

22 But by doing so, again, even giving credit to
23 everything that the defendant has said in his letter, by doing
24 so, it deprived these entities of doing the searches they needed
25 to do to perform their governmental functions, functions that

1 keep the citizens of this country safe, and everyone else in the
2 country, citizens and non-citizens, keeping everyone safe.

3 When the Court looks at the defendant's history and
4 characteristics, of course we've talked about this a lot, so I'm
5 not going to read through every page of the presentence report
6 aloud as I normally do. The things that stand out -- and I've
7 read and highlighted the things that I thought were important
8 here, I read every single letter, read the position statements
9 carefully -- the things that stand out are, of course, that the
10 defendant's parents had come to this country and they have done
11 well. Comes from a family that has excelled. He faced, of
12 course, the challenges of anyone having to make that transition.
13 And then on top of that had the childhood cancer at age 12, the
14 challenges that come with that. And then, it appears, had the
15 very unfortunate incident of taking the Zoloft and having that
16 set off some sort of psychotic event for him, and the challenges
17 that arose from that and then becoming stable again.

18 And you know, the other side of that is the defendant
19 comes from a very close-knit family and community that provided
20 an awful lot of support for him, and is obviously loved very
21 much by a lot of people when you read these letters. And so the
22 history and characteristics of the defendant provide much to his
23 credit.

24 We don't have a criminal history to deal with here.

25 Defendant has worked. He's had an employment history.

1 Clearly worked in the family business, sought other jobs. He
2 has discussed his frustration at not being able to find jobs in
3 his field after receiving the degree he had in criminal justice
4 and his associated concern that some of that could be the result
5 of prejudice, inappropriate prejudice against him.

6 The Court is required to consider the need for the
7 sentence to reflect the seriousness of the offense. And as I
8 said, it's very serious, because it deprives the government of
9 the ability to do its due diligence and to make the
10 determinations it must. There are checks and balances on the
11 determinations that the government makes. We spend a lot of
12 time and effort to ensure that people get their due process.
13 And so if, if you were to give the defendant the benefit of the
14 doubt and say that what happened was just because he was
15 concerned that he wouldn't get a job, you know, there are ways
16 to deal with that. You must be open and honest, and then if you
17 think that a decision has been inappropriately made, you appeal
18 the decision. You take it to whatever level you need to. And
19 so the gloss, if you will, on the seriousness of the offense
20 when you look at the entire context, is very troubling.

21 The Court is required to also impose a sentence that
22 promotes respect for the law and provides a just punishment.
23 Here, much of this is murky, much of it is not. The degree to
24 which the statements that the defendant made to the confidential
25 human source, as we get into late 2016, early 2017 and onward,

1 lacks clarity. We have the FBI statement as to what one of the
2 analysts there thought, but we don't know.

3 So the need to afford adequate deterrence. The Court
4 must consider what will deter the defendant from this kind of
5 activity; again, that is, the criminal activity here. The
6 government points out that if we had some kind of mental health
7 break or issue at the time that these statements were made, it
8 raises a different specter. The Court can't really speculate
9 about that. But the Court does have to think about specific
10 deterrence to this defendant and general deterrence, and does
11 give that weight.

12 The Court has to protect the public and provide the
13 defendant with any needed education or treatment.

14 The letter the defendant provided is quite
15 introspective. It reflects the need, perhaps, for some
16 additional counseling. I think that would be appropriate.

17 And the Court is required to consider the sentencing
18 range here. I've talked about the kind of normal, sometimes
19 referred to in the guidelines cases as a mine-run case, but in
20 this case, the combination of these two crimes can't be
21 overlooked. There's force, there's greater weight to the two
22 crimes because one was meant to facilitate covering up the
23 other, and because of all of the context that we've been talking
24 about here.

25 You know, this issue of the CIA letter, I'll address

1 that -- or CIA application, I'll address that for a moment.
2 Frankly I think it cuts both ways. It's not something that's
3 particularly telling to me, and I don't really fault anybody for
4 not -- at least from the defense side -- for not following up on
5 it. We don't know exactly what may be discovered. But it
6 really cuts both ways if it did happen. Because it doesn't
7 really diminish the possibility about the reason for which the
8 defendant may have been engaging in this activity. And it
9 doesn't really affect the fact that the activity, the criminal
10 activities here were to cover up what happened in Jordan. And
11 that is not going to be changed. And the potential discovery of
12 all these other facts that kind of would probably -- some of
13 which would have been discovered as a result of the Army, the
14 Armed Forces finding out about the trip and what happened there
15 and what may have preceded it.

16 The government -- I think frankly this Fourth Circuit
17 case that we've been talking about recently, the Blue case that
18 requires me to address all non-frivolous arguments for a
19 variance applies with equal force to a request for an upward
20 variance as it does to the normal downward variance that I get.
21 The government's argued -- therefore I'll try to address them,
22 if I haven't.

23 The government's argued that the defendant's acts
24 related to this offense involved support for the ISIS, a
25 designated foreign terrorist organization. I've talked about

1 that as I tick down the list on the nature and circumstances,
2 they have argued that ISIS has called for violent attacks
3 against the U.S. -- or within the U.S., and the defendant
4 appeared to be receptive to that encouragement and interested in
5 personally participating in such acts. Again, that's part of
6 the nature and circumstances of the offense when you think about
7 the defendant's fear that the military would follow up on the
8 Jordanian trip and find out about potentially more of what he
9 was saying and doing. And clearly the defendant traveled
10 overseas with the apparent goal of at least getting very close
11 to ISIS, as he says in his letter, and facilitating the ultimate
12 revolution, as he says, hoping someone else other than ISIS
13 would bring that about. But he wanted to go there and be close,
14 he says in his letter, so that he could help facilitate and be
15 ready to jump in and join.

16 The government argues that the passport fraud and the
17 false statements were not, as is typically associated with
18 immigration fraud or other less-serious reasons for deceit, but
19 were instead motivated by efforts to secure employment with the
20 U.S. Army while at the same time hiding his ideological
21 motivation for doing so. I've already addressed that.

22 Ticking down the reasons, the government says the
23 defendant's conduct at a minimum approached conduct sufficient
24 to warrant a substantial terrorism enhancement. I have stepped
25 away from that, really. I think that's not a place we go here

1 when we just focus on the 3553(a) factors.

2 The need to protect the public. The government says
3 the defendant poses a substantial risk to the public after
4 release, as he has praised violent attacks on U.S. soldiers on
5 U.S. military bases and has himself attempted to join the U.S.
6 Army. There's clearly some reason to be concerned about the
7 future risk, though frankly the statements from the FBI analyst
8 call that into question. And so the Court considers all of that
9 information in weighing it.

10 The government points out that his detention in Jordan
11 was fortuitous and he may have succeeded in carrying out violent
12 acts. Well, we just don't know, of course, what might have
13 happened.

14 And we have the statements the defendant made about
15 being elated when violent killings of civilians were successful
16 in Paris and Orlando, and his admiration for ISIS, though of
17 course he stepped back from those statements later. Whether it
18 was genuine or not we don't know. I suppose in the same way we
19 don't know the degree to which the defendant may have been
20 puffing in some of his earlier statements. But the consistency
21 in all these earlier statements and the visit to Jordan is all
22 very troubling.

23 And the defendant also expressed a desire to blend in
24 to society to do something glorious and that he wanted to make
25 non-Muslims suffer, all part and parcel of this.

1 So having carefully considered all of that, the Court
2 is now prepared to impose sentence in the case.

3 Although maybe not. I think I left something sitting
4 on my desk.

5 Matthew?

6 (Court and law clerk conferred.)

7 THE COURT: I will say this: I'm going to vary
8 upward. I'm going to vary upward. I'm not going vary upward to
9 the degree that the government has asked me to. I think this
10 case is different than the kind of cases the Court normally
11 sees. I think, as I said earlier, the combination of these two
12 things, these two crimes together, is such that it creates a
13 heightened concern for the Court. And I'm going vary with
14 respect to the sentence, actual sentence imposed, I'm going to
15 vary upward. I'm going to vary upward on the supervised release
16 term also because of the significant concerns raised here.

17 Pursuant to the Sentencing Reform Act of 1984, it is
18 the judgment of the Court that the defendant, Shivram Patel, is
19 hereby committed to the custody of the United States Bureau of
20 Prisons to be imprisoned for a term of 60 months. This term
21 consists of 30 months on Count 1 and 60 months on Count 3, to be
22 served concurrently.

23 Defendant is remanded to the custody of the United
24 States Marshal to serve his sentence.

25 Upon release from imprisonment, Mr. Patel shall be

1 placed on supervised release for a term of six years. This term
2 consists of three years on Count 1 and three years on Count 3,
3 to be served consecutively.

4 Within 72 hours of release from custody of the Bureau
5 of Prisons, the defendant shall report in person to the
6 probation office in the district to which he is released. He
7 shall refrain from any unlawful use of a controlled substance
8 and submit to one drug test within 15 days of release on
9 supervised release, and at least two periodic drug tests
10 thereafter as directed by the probation officer.

11 While on supervision, Mr. Patel shall not commit
12 another federal, state or local crime, and shall not unlawfully
13 possess a controlled substance and shall not possess a firearm
14 or a destructive device.

15 Mr. Patel shall comply with the standard conditions
16 that have been adopted by this court for people on supervised
17 release.

18 In addition, he shall participate in a program
19 approved by the probation office for mental health treatment.
20 The costs of this program to be paid by him to the extent he's
21 capable, as directed by the probation officer.

22 If he tests positive for illicit drugs, he shall
23 participate in a program approved by the U.S. Probation Office
24 for substance abuse, which program may include residential
25 treatment and testing to determine whether he's reverted to the

1 use of drugs or alcohol, with partial costs to be paid by him,
2 all as directed by the probation officer.

3 He shall waive all rights of confidentiality regarding
4 substance abuse and mental health treatment in order to allow
5 the release of information to the probation office and authorize
6 communication between the probation officer and the treatment
7 provider.

8 He shall not have any contact with any known or
9 purported member of any designated foreign terrorist
10 organization during his period of supervision in light of the
11 factual context of this case.

12 He shall comply with the requirements of the Computer
13 Monitoring Program as administered by the probation office. He
14 shall consent to the installation of computer monitoring
15 software on any computer to which he has access. Installation
16 shall be performed by the probation officer, and the software
17 may restrict and/or record any and all activity on the computer,
18 including the capture of keystrokes, application information,
19 Internet use history, email correspondence and chat
20 conversations. A notice will be placed on the computer at the
21 time of installation to warn others of the existence of the
22 monitoring software. The defendant shall also notify others of
23 the existence of the monitoring software. Defendant shall not
24 remove, tamper with, reverse-engineer or in any way circumvent
25 the software. The costs of the monitoring are to be paid by the

1 defendant to the extent he's capable.

2 During his term of supervision, he shall not possess
3 or utilize any video gaming system, console or other device that
4 would enable contact and/or the sharing of data to individuals
5 known or unknown to the defendant.

6 The Court finds that the defendant is capable of
7 paying a fine. He shall pay the following penalties:

8 \$200. That's \$100 on each count for a special
9 assessment. No restitution is imposed.

10 The defendant shall pay a fine of 2,000 as to Count 1
11 and 2,000 as to Count 3, for a total of \$4,000. The special
12 assessment and fine is due in full immediately. Any balance
13 remaining unpaid on it at the beginning of supervision shall be
14 paid by the defendant in installments of not less than \$150 a
15 month until paid in full, and the payments shall begin 60 days
16 after supervision starts.

17 At the time it starts, the probation officer can
18 consider defendant's economic status and ask me to make changes
19 to these. Special assessment and fine payments are subject to
20 penalties for default and delinquency, and nothing in my order
21 prohibits the collection of any judgment or fine by the United
22 States.

23 Payment of these penalties is due during the period of
24 imprisonment to be made to the clerk of this court except those
25 payments made through the Bureau of Prisons Inmate Financial

1 Responsibility Program.

2 Defendant shall notify the U.S. Attorney for this
3 district within 30 days of any change of name, residence or
4 mailing address until all fines, costs and special assessments
5 imposed by the judgment in this matter are fully paid.

6 There's a consent order of forfeiture here which the
7 Court has entered.

8 The Court will now also address the manner in which it
9 reached the upward variance in the case.

10 The defendant's guideline range in this case, as the
11 Court noted at the beginning of this hearing, flows from his
12 offense level 11 and criminal history category I which had
13 resulted in a guideline range of eight to 14 months. The Court
14 has imposed a guideline range -- excuse me, has imposed a
15 sentence of 60 months. The Court considered as it moved up the
16 offense levels where moving up those offense levels would bring
17 the Court to a sentence that was sufficient but not greater than
18 necessary to accomplish all these purposes of sentencing. The
19 government would have had the Court essentially move up to
20 offense level 28 or even 29. And the Court, once it arrived at
21 offense level 24, concluded that that was a place with a
22 criminal history category I that would satisfy all the purposes
23 of sentencing.

24 Mr. Patel, just a couple other things.

25 As part of the plea agreement, you waived your right

1 to appeal, with the exception of certain ineffective assistance
2 of counsel claims that can be brought on direct appeal.
3 Generally, waivers of appeal are enforceable; however, if you
4 believe that your waiver is unenforceable, then you may present
5 that issue to the U.S. Court of Appeals. To do that, you must
6 file a notice of appeal within 14 days from entry of judgment in
7 the case. If you do not file the notice of appeal on time, you
8 may lose your right to appeal. You have the right to be
9 assisted by an attorney on appeal. One will be appointed for
10 you by the Court if you cannot afford to hire an attorney. You
11 may be permitted to file the appeal without payment of the costs
12 if you make a written request to do so. Also, if you make a
13 request of the clerk's office, someone there will prepare and
14 file the notice of appeal for you.

15 I will recommend that you, consistent with the
16 purposes of the Bureau of Prisons, be housed as close to
17 Virginia as possible so that you can have contact with your
18 family.

19 And I will say this also to you before I ask the
20 government if it has anything else: You know, everybody here
21 was engaged to some extent in looking into a crystal ball and
22 trying to figure out what has been going on in your mind,
23 particularly more recently. And I certainly like to think that
24 your letter was a fulsome explanation of the way you perceived
25 what was going on. And I hope that it does reflect a shift in

1 some of your views. And I certainly do hope that you will be
2 able to return to the community and do the things that all these
3 letters said so many nice things about you and your background
4 and the kind of person that you have been growing up and the
5 involvement that you've had in the community.

6 And you know, I know your parents are sitting back
7 there, I suspect, just hoping that you are able to make good use
8 of this time -- you're a very young man -- and that you'll be
9 able to come back out and turn things around. And that's the
10 Court's sincere hope for you, because we hope that every single
11 person in this country does the kind of things that are
12 necessary for them to flourish and to make a good life for
13 themselves and to make the country better. And that's what we
14 hope for you.

15 THE DEFENDANT: Thank you, Your Honor.

16 THE COURT: Mr. Bosse, anything else?

17 MR. BOSSE: Yes, sir, Your Honor. The government
18 moves to dismiss Count 2 of the indictment.

19 THE COURT: Court will dismiss Count 2 without
20 objection.

21 Mr. Clancy, is anything else we need to address?

22 MR. CLANCY: No, Judge. I appreciate you making the
23 recommendation, as much as you can, that we keep him as close to
24 his family as possible.

25 THE COURT: All right. I wish you well, Mr. Patel.

1 THE DEFENDANT: Thank you, sir.

2 (Whereupon, proceedings concluded at 12:41 p.m.)
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CERTIFICATION

I certify that the foregoing is a true, complete and correct transcript of the proceedings held in the above-entitled matter.

Paul L. McManus, RMR, FCRR

Date